



Yale Journal of Law & the Humanities

Volume 10 | Issue 2

Article 9

January 1998

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Recommended Citation

Judith Resnik, *On the Margin: Humanities and Law*, 10 YALE J.L. & HUMAN. (1998).

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On the Margin: Humanities and Law

Judith Resnik*

Austin Sarat reminds us that law is part of “The Humanities” and that the study of law could be situated appropriately in a liberal arts college committed to the humanities.¹ Yet given that law *is* humanities, it is poignant to consider how marginal the study of humanities is to law schools, which constitute one venue (but not the only, as Austin Sarat explains) in which law is taught.

A word of definition is needed. In his discussion here, Austin Sarat implicitly equates humanities with literary or critical studies and history, rather than a wider range of disciplines that embraces the social sciences. Given that Austin Sarat’s own scholarship includes some of the most significant essays giving insights into law through social science methodology,² I know his definitions are broader. But I will assume his focus and leave the debate about the category to another time. The more limited framing intersects with two of my own interests, for I teach and write about issues bearing the titles of “Law and Literature” and “Feminist Theories in Law.” Each of these enterprises fits the point of marginality: Each sits in a corner of the curriculum of law schools, rather than occupying a space assumed to be the core.

* Arthur Liman Professor of Law, Yale Law School. © All rights reserved. My thanks to Mark Fenster, Yale Law School Class of 1998, who prompted me to write this Essay, to Denny Curtis and Carolyn Heilbrun, always willing to think with me, to Carol Rose for her comments at the panel, and to Austin Sarat, for starting the conversation.

I appreciate the flexibility of the editors of the *Yale Journal of Law & the Humanities* for permitting me to deviate (again) from the requirements of the *Bluebook*, which insists on the use of “et al.” rather than the names of those who coauthor articles or books. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION Rule 15.1.1 (16th ed. 1996) [hereinafter BLUEBOOK]. For a discussion of a prior departure—using the first and last names of authors of articles and books—and the subsequent revision of the legal citation rule, see *infra* note 20.

1. See Austin Sarat, *Traditions and Trajectories in Law and Humanities Scholarship*, 10 YALE J.L. & HUMAN. 401 (1998).

2. See, e.g., William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 L. & SOC’Y REV. 631 (1980-81); William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992). The import of Sarat’s work is also recognized by his leadership role in the Law & Society Association.

Two brief empirical forays make this point, one anecdotal and the other quantitative. Last year I taught the course Feminist Theories in Law at another law school, where I was visiting. That school lists courses for registration under headings such as “Constitutional Law” and “Commercial Law.” I looked under the heading “Jurisprudence, History, Ethics” and found courses such as “Critical Race Theory” and “Legal History.” Not finding the class I planned to teach there, I called the registrar’s office to point out the oversight. I was instructed that I had looked in the wrong place. Feminist Theories in Law could be found in the course listing—under the heading “Family Law.”

Another example of marginality comes from quantitative studies undertaken by Elizabeth Gemmette, who has looked into the actual practices of the field of law and literature by surveying law schools to learn whether they offer courses in this field and if so, what they teach.³ What did she learn? Of 199 schools queried in the middle of the 1990s, fewer than fifty percent reported teaching some kind of “law and literature course.” What do the teachers of this course—eighty-four of them—teach? Gemmette found assignments of works both of fiction and nonfiction. Twenty-two works of nonfiction were assigned more than three times.⁴ The author who heads the list of citations is Richard Posner, who was in 1996 the chair of the American Law and Economics Association and is the author of a book, *Law and Literature: A Misunderstood Relation*,⁵ that does not invite literature into law school study.

In short, I share Professor Sarat’s understanding of the marginality of the enterprise “Law and Humanities.” But I think that the reasons for such marginality need more exploration—as a predicate to alteration of the status quo and as a predicate to understanding what forms of alteration are either plausible or desirable.

Thus let’s sit with an idea of marginality and law schools for a moment. Note that what is *not* marginal to law schools is the study of economics and the study of philosophy. No law school—at least, of

3. See Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665 (1995) [hereinafter Gemmette, *Joining the Class Action*]; see also Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 VAL. U. L. REV. 267 (1989) (reporting results from an earlier study). Gemmette is the editor of a series. See LAW IN LITERATURE: LEGAL THEMES IN DRAMA (Elizabeth Villiers Gemmette ed., 1995); LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES (Elizabeth Villiers Gemmette ed., 1992).

4. See Gemmette, *Joining the Class Action*, *supra* note 3, at 666-71.

5. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). The book received a critical reception from many. See, e.g., J.M. Balkin, *The Domestication of Law and Literature*, 14 L. & SOC. INQUIRY 787 (1989); Stanley Fish, “Don’t Know Much About the Middle Ages”: Posner on Law and Literature, 99 YALE L.J. 777 (1988).

the five with which I have been affiliated—hesitates to make either of these centerpieces of the education of students. What distinguishes the study of economics and of philosophy from that of critical or literary studies? Both economics and philosophy offer certain forms of abstraction that rely on an amalgam of logic and concreteness sometimes elusive to Law and Humanities, at least in its current incarnation as a melange of literary and critical studies. In contrast to the authority of both economics and philosophy, literary and critical studies are seen by some within law schools as somehow “soft” (with its gendered connotations).

Actually, not quite all forms of literary and critical studies. When literary studies were seen as “Interpretation” (capital “I”), they gained a toehold within the legal academy as a source of power because of an association with conceptual problems otherwise understood as falling within the domain of philosophy and jurisprudence. Certain aspects of some work within the Critical Legal Studies school share that potential when they associate with more traditional forms of political theory or philosophy.

But when literary and critical studies take a turn toward narrative, toward feminist, gender, or queer theory or toward Critical Race Studies, their authority within law schools diminish.⁶ Part of that diminution in authority stems from an underlying interpretative battle. On one side, within economics and philosophy, sit the expositors of “grand theory” or what Nancy Fraser has called “metanarrative.”⁷ On the other side, often within feminist studies and many forms of literary theory, one finds an implicit or explicit localism, exemplified by the many forms taken by these “area” studies that in turn give rise to images of proliferating subsets and identity politics run amok. When feminist theories, for example, challenge not only what constitutes the subject matter but also the potential for singular universalist narratives, the battle for power over the conversation is genuine. Currently, authority resides with the universalists.

My first point is that the marginality of humanities within law schools reflects a real struggle over an interpretative stance toward the world of ideas. Economics and philosophy follow relatively easily in the steps of expositors of Neutral Principles, the Hart and Wechsler paradigm that held out a promise of a safe space in which to understand the choices that those with power had.⁸ Security can be

6. A negative comment within many faculties leveled against such work is that it is “undertheorized.”

7. See Nancy Fraser, *False Antitheses: A Response to Seyla Benhabib and Judith Butler*, 11 PRAXIS INT’L 166 (1991).

8. A casebook edited by Hart and Wechsler, see HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953), has gone on in

found there, a haven that offers the hope of predictability and stability.

My second point requires pushing a bit harder yet at law schools' unease with the particularism of Law and Humanities. After all, law is itself a very local enterprise, both in terms of its method of analyzing particular cases and in terms of its interest in specific governing regimes. Law is parochial in many of its enactments. Further, a prime technique of teaching law—reading cases—is reading narratives. (A textual footnote here is in order. Over the decades, the case method has devolved into what might be termed the “snippet of a case” method. Many casebooks are comprised of such truncated versions of original opinions as to provide little by way of factual specificity or legal argument to permit intense engagement with the specifics of the reprinted case or to enable students to share or to disagree with the stance provided either by casebook editor or classroom teacher.⁹) Given the official—albeit increasingly superficial—commitment to the case method, one might have thought that law schools would embrace those intrigued by narrative as “within the fold,” and perhaps attempt to subsume them as within the ordinary workings of “the legal mind.”

But during the same decades (the 1970s through the 1990s) when classes and ideas called “Law and Humanities” were pushing themselves forward, many law schools saw themselves as in need not so much of the particular as of the GRAND. Hence, they turned to “Philosophy” and “Economics” (or more correctly, small subsets of both of these fields) as a source and means of advancing law schools' own claims to authority, particularly within the academy. Moreover, during the last few years, the turn toward the “global” has only exacerbated law schools' concerns about their authority. Globalization is another threat to the power of law schools and yet another source of pressure toward the metanarrative.

Recall that my first explanation of the marginality of humanities within law schools stemmed from truly divergent intellectual stances,

subsequent editions to bear their names in its title, *see, e.g.*, RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS* (4th ed. 1996). The book makes a set of assumptions (such as allocating decisionmaking based on institutional competency) that animate approaches to legal problems. *See generally* Richard H. Fallon, Jr., *Reflections on the Hart & Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994). The phrase itself comes from Herbert Wechsler's essay, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959). Another expression of the “legal process school method” can be found in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994), which was only recently published but has been taught for years in many law schools.

9. One rebellion—cumbersome in length—against that trajectory can be found in ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, *PROCEDURE* (1988), which in some instances offers many readings and multiple opinions from the “same” case.

resulting in a power struggle *within* law schools for authoritative voice (rather than a shared commitment to a multiplicity of authoritative conceptual stances). My second point is about the marginality of law in a wider domain. The struggle for power occurs not only within law schools but also without, as law schools seek to be players in the world at large. Law schools' own understanding (or fear) of their fragile hold on authority in the academy and their aspiration to participate in worldwide governance press toward unifying narratives with simplifying claims.

My third point is that this story is too simple, for it assumes that law schools have all the agency. I think—and have written¹⁰—that much of the failure of “Law and Literature” within the legal academy stems from the work of some of its leading exponents. They, who claimed to provide the path for a return to imagination, were themselves of limited visions.

Again, I rely on the empirical mode, for which I have great respect. Elizabeth Gemmette tells us that, within the eighty-four schools that teach Law and Literature and the twenty-two works of nonfiction assigned more than once, Richard Posner dominates the list. Thereafter follow Henry David Thoreau, Richard Weisberg, and James Boyd White. Of these top twenty-two critics, only one woman—Patricia Williams—made the list. And given that some of the work of Patricia Williams relies on a melange of storytelling (such as her “polar bear” essay¹¹), she might be read as sitting at the juncture of nonfiction and fiction.

Gemmette tells us that the contours of Law and Literature are not fixed; that within the last half-dozen years, some works of fiction by women (such as Susan Glaspell's *A Jury of Her Peers*¹² or Toni Morrison's *Beloved*¹³) now appear on a few reading lists, mostly in courses taught by women.¹⁴ Yet women as professors of the metier, as critics shaping the discourse, remain unrecognized as authoritative by teachers within the domain. Further, given that much of what

10. See Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990); Judith Resnik, *Changing the Topic*, 8 CARDOZO J.L. & LITERATURE 339 (1996); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990) [hereinafter Resnik, *Constructing the Canon*].

11. See PATRICIA J. WILLIAMS, *On Being the Object of Property*, in THE ALCHEMY OF RACE AND RIGHTS 216, 228 (1991).

12. Susan Glaspell, *A Jury of Her Peers*, in SOCIAL INSIGHT THROUGH SHORT STORIES 62 (Josephine Storde ed., Harper & Brothers 1946) (1917). Several recent essays examine the meanings of this story. See, e.g., Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229 (1996); Patricia L. Bryan, *Stories in Fiction and in Fact: Susan Glaspell's A Jury of Her Peers and the 1902 Murder Trial of Margaret Hossack*, 49 STAN. L. REV. 1293 (1997).

13. TONI MORRISON, *BELLOVED* (1987).

14. See Gemmette, *Joining the Class Action*, *supra* note 3, at 687-88.

Richard Posner has written comes in response to and in debate with Robin West, the absence of frequent references to her voice is all the more disheartening.¹⁵

Just as Law and Literature was emerging (actually reemerging) in the legal academy, its possible coventurers also came to the fore: feminist theory, Critical Race Studies, and narrative studies that included works of so-called “outsiders.” Yet Law and Literature exponents have done relatively little—until recently—to understand the cross-currents. I do upon occasion sit on panels at Law and Literature conferences under the sign of “Feminism,” an enterprise understood as separate from rather than part of the general activity of Law and Literature. One might describe this phenomenon as being the “handmaiden” of a “handmaiden,” or, to use Peter Brooks’s choice,¹⁶ the “scullery maid” of a “scullery maid.” Alternatively, one could use these terms to raise a question: Why do such metaphors, so gendered, raced, and classed, retain continuing vitality?

In short, the conventional framings of Law and Literature are either law *as* literature (interpretation theory) or law *in* literature (*Billy Budd*¹⁷). The conventional texts are either Supreme Court opinions or “great books.” This framing misses that literature is of use not only in the service of law. Knowing something of law offers ways of interpreting literature and makes plain that literary works ventured ahead of law to places that law had not yet understood.¹⁸ Moreover, rather than conceptualizing either discipline as being in the service of the other, one might have considered the joint venturing of the disciplines, for example, such as the erasure of feminist concerns for a long time in both.

Indeed, the multitude of voices within law—litigants, lawyers, lower court judges, witnesses—have been silenced by the narrow band of texts serving as the basis for literary interpretation of law. In the emerging “canon” of what falls within late-twentieth-century Law and

15. See, e.g., Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988).

16. See Peter Brooks, *A Slightly Polemical Comment on Austin Sarat*, 10 YALE J.L. & HUMAN. 409, 409 (1998).

17. HERMAN MELVILLE, *BILLY BUDD AND OTHER TALES* (Signet Classics 1979) (1920).

18. As Carolyn Heilbrun explained, Thomas Hardy’s *Jude the Obscure* offered the model of a woman, Sue Brideshead, seen as “problematic” because she “doesn’t like marriage because it licenses the man to have sex on the premises whenever he wishes and, that worse, she doesn’t think a woman should ever have sex unless she wants to.” Heilbrun & Resnik, *supra* note 10, at 1931. Articulated in 1896, Brideshead’s views predated women’s legal rights to refuse by decades. See THOMAS HARDY, *JUDE THE OBSCURE* (London, MacMillan 1896).

Literature in law schools, women remain barely visible. My point here is not to argue about the need for “outsider voices,” but rather to insist that *insiders* be heard.¹⁹ But unfortunately, many Law and Literature courses have echoed the conventional curriculum, albeit with a different interpretative stance. The most visible expositors have not attempted to attach themselves to other transformative currents within the legal terrain.

Thus far, I have mentioned those “other” currents as forms of feminist, race, and critical studies, but I should note one other category that ought to be a part of this conversation—law schools’ clinical programs. What do clinical programs have to do with Law and Humanities? It is often in clinical programs, in intense, one-on-one settings, that law students and law teachers have occasions upon which to deal with the human, the particular, the local, the specific, the complex, the thick narrative. Yet these aspects of clinical programs are perceived by many within elite law schools as too specific to be the basis for the larger intellectual work that belongs to the theoretical purposes of law. Moreover, rather than debate the underlying contours, clinical teachers (themselves fragile within the authority systems of law school) often attempt to downplay this aspect of their curriculum by shifting the focus to large administrative or class action litigation, aimed at institutional changes.

In short, Austin Sarat and I agree that Law and Humanities—ten years later or more (here not assuming that the publication of the first issue of Yale’s *Journal* should serve as a marker of commencement)—sits as a margin note to law schools’ curricula. What then is to be done? Austin Sarat would have us give up on law schools and move on. He would have us concentrate on building new institutions, new disciplines, new alliances.

I am a member of more organizations that I can list. All of us who teach could be affiliated with anywhere from two to four departments within a university and a dozen professional organizations outside. While being a part of many institutions, few of us actually play a serious part in any. Professor Sarat’s call might be seen as yet more proliferation, although I understand that he is searching for a means to regroup (to weave together if not a metanarrative, then a vision sufficiently shared to capture more of the stage). But I think that new institutional structures, unaccompanied by stunning resources, are

19. Even within the category of the judicial opinion, a narrowed focus on Supreme Court texts alone permits misunderstanding the state of the law and the degree to which those texts innovate. See, e.g., Resnik, *Constructing the Canon*, *supra* note 10, at 222-26 (discussing Robert Ferguson’s reading of *Minersville School District v. Gobiitis*, 310 U.S. 586 (1940), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

unlikely to be the means of refocusing attention. Simplifying stories and abundant wealth—two techniques that have succeeded in reorienting law toward a self-description of utilitarianism—are not the hallmarks of the humanities.

I live in a law school and am reluctant to heed the advice to move on. Moreover, it is the very instrumentality of legal education that has drawn me to this perch. I take the struggle to be about voice, focus, and purpose.²⁰ And the place for those questions, for me, remains within law schools. Deep-seated resistance to Law and Humanities comes from the intellectual commitment of leading law schools that style themselves as proponents of Grand Theory and do not welcome the particularism and localism entailed in some forms of humanities scholarship and in many forms of clinical practice. Therefore, the transformations and syntheses that intrigue me are those under the umbrella called Law School, in which sitting arrayed but not in much dialogue are social practices and intellectual conceptions that share a concern for humanity.

The task is to celebrate that concern and to entrench it within an understanding of “the law.” That was the work ten years ago, and it has only gotten harder.

20. A footnote about the levels at which change is and was needed seems appropriate in this context. Law school citation rules (the *Bluebook*) once prohibited the use of the first names of authors of articles or books; those who wrote books did get their first initial. See BLUEBOOK, *supra* note *, Rule 15.1.1 (14th ed. 1986).

Carolyn Heilbrun and I, writing an essay about feminism, law, and literature and publishing in the *Yale Law Journal* in 1990, objected:

Using only last names not only limits access (when authors have common names) and often relies upon reader recognition of those already well-known but also assumes that gender is irrelevant. The provision of first initials for those who write books but not articles privileges one form of writing over another.

Heilbrun & Resnik, *supra* note 10, at 1913 n.**. We were permitted to depart from the convention for that essay.

We were not the only dissenters. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 829 n.* (1990). Professor Bartlett explained:

I had wanted to humanize and particularize the authors whose ideas I used in this Article Unfortunately, the editors of the *Harvard Law Review*, who otherwise have been most cooperative, insisted upon adhering to the “time-honored” *Bluebook* convention of using last names only First names have been one dignified way in which women could distinguish themselves from their fathers and their husbands. I apologize to the authors whose identities have been obscured

The rules changed. See, e.g., BLUEBOOK, *supra* note *, Rule 16.1 (using Heilbrun & Resnik, *supra* note 10, as an example of the rule that requires the inclusion of the full names of authors of articles). In this comment, I depart (with the permission of the editors of this *Journal*) from the prohibition on giving all authors of an article or book the credit of naming them. The convention of “et al.” in lieu of names not only privileges the first author but also ignores that, in many instances, the last named person is the most junior and in most need of recognition (as well as often a major contributor of time and effort to the joint enterprise).